APPENDICES

APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eighteenth day of September, 1997.

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

1-10 Mo. No. 918

JERROLD ZIMAN, *et al.*,
Appellants,
v.
NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL, *et al.*,
Respondents.

JERROLD ZIMAN, *et al.*,
Appellants,
v.
THE STATE OF NEW YORK,
Respondents.

A motion for leave to appeal to the Court of Appeals in the above causes having heretofore been made upon the part of the appellants herein and papers having been submitted there on and due deliberation having been thereupon had, it is

ORDERED ,that the said motion be and the same hereby is denied.

/s/ Stuart M. Cohen
STUART M. COHEN
Clerk of the Court

APPENDIX B

AT A TERM OF THE APPELLATE DIVISION OF THE SUPREME COURT HELD IN AND FOR THE FIRST JUDICIAL DEPARTMENT IN THE COUNTY OF NEW YORK, ON MAY 8, 1997

Present, HON. E. LEO MILONAS, Justice Presiding, BETTY WEINBERG ELLERIN, ISRAEL RUBIN, ANGELA M. MAZZARELLI, Justices

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M-1302

Index No. 113700/93

JERROLD ZIMAN, *et al.*,
Plaintiffs-Appellants,

-against-

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL, *et al.*,
Defendants-Respondents.

JERROLD ZIMAN, *et al.*,
Claimants-Appellants,

-against-

THE STATE OF NEW YORK,
Defendants-Respondents.

Plaintiffs/claimants-appellants having moved for leave to appeal to the Court of Appeals from this Court's decision and order entered on January 30, 1997 (Appeal No. 59832-59833),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that said motion be and the same is denied.

ENTER:

/s/ Catherine O'Hapan Wolfe
Clerk

APPENDIX C

STATE OF NEW YORK
SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

59832-59833

JERROLD ZIMAN, *et al.*,
Plaintiffs-Appellants,

-against-

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL, *et al.*,
Defendants-Respondents.

JERROLD ZIMAN, *et al.*,
Claimants-Appellants,

-against-

THE STATE OF NEW YORK,
Defendants-Respondents.

MILONAS, J.P., ELLERIN, RUBIN, MAZZARELLI, J.J.

Judgment, Supreme Court, New York County (Stephen Crane, J.), entered May 10, 1995, which, *inter alia*, declared that plaintiffs' due process rights were not violated, and order, Court of Claims (Louis Benza, J.), entered on or about May 17, 1996, which, *inter alia*, granted defendant State of New York's cross motion for summary judg-

ment dismissing appellants' claim, unanimously affirmed, without costs.

Since appellants did not meet the literal requirements of Court of Claims Act § 10(1), the Court of Claims properly found that their action was not timely commenced and that relief under CPLR 205(a) was not available to toll the statutory limitations period (*see, Dreger v New York State Thruway Auth.*, 81 NY2d 721).

The purported delay of respondent Department of Housing and Community Renewal in processing appellants' applications for hardship certificates of eviction necessitated by the passage of the Twenty Year Law did not effect an unconstitutional "taking" of property since the law advanced a legitimate State interest and appellants were not denied an economically viable use of the property (*see, Dawson v Higgins*, 197 AD2d 127, 137-138, *appeal dismissed* 83 NY2d 996, *cert denied sub nom. Dawson v Halperin*, 115 S Ct 724). Nor were appellants deprived of due process by respondents' actions, or the laws and regulations involved herein, as all bore a reasonable relationship to a valid public purpose.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

Entered: January 30, 1997

/s/ Catherine O'Hapan Wolfe
Clerk

APPENDIX D

[Filed May 17, 1996]

STATE OF NEW YORK
COURT OF CLAIMS

Claim No. 92736

JERROLD ZIMAN AND ELLEN ZIMAN,
Claimants,

-against-

THE STATE OF NEW YORK,
Defendant.

Motion No. M-53104
Cross Motion No. CM-53352

Before: HONORABLE LOUIS C. BENZA, Judge of the Court of Claims.

MEMORANDUM DECISION and ORDER

BENZA, J.

Claimants seek an order pursuant to CPLR 3212 granting them summary judgment on the issue of liability for the de facto appropriation of their property. The State cross-moves pursuant to CPLR 3211 and 3212 for an order dismissing the claim.

Claimants' claim arises from their efforts to evict three tenants [1] from a town house they bought on Minetta Lane in Manhattan and the number of years it ultimately took to accomplish this. They purchased the property in February 1984 and sought to obtain the units for their

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[1] One tenant died during the course of the proceedings. Eviction warrants were ultimately issued against the remaining two.

personal use and occupancy by applying to the Division of Housing and Community Renewal (DHCR) for certificates of eviction of the tenants. Claimants were prevented from obtaining the certificates of eviction due to the enactment of Chapter 234 of the Laws of 1984 (9 NYCRR 2204.5 [a]), which, among other things, protects from eviction tenants who have been residents in rent-controlled apartments for more than twenty years (the Twenty-Year Law).

In August 1984 claimants then moved for eviction based on a different ground, to wit, a "hardship" eviction pursuant to 9 NYCRR 2204.9 and 2204.4 (g) because they could not earn an 8½ percent return on the assessed value of the property. Two financial audits, completed in April and October 1985, respectively, and a fact-finding hearing established that claimants qualified for the hardship application.

In June 1986 a DHCR Administrative Law Judge ruled that despite claimants' showing of hardship, they were not permitted to evict their tenants because the hardship provisions of the rent control law could not circumvent the separate protection provided by the Twenty-Year Law. Claimants commenced an article 78 proceeding challenging DHCR's decision. In August 1988 the Supreme Court upheld the decision, holding that DHCR's order was not unconstitutional as applied.

In August 1989 the Appellate Division reversed the Supreme Court decision and ordered DHCR to issue certificates of eviction based on claimants' hardship application (*Matter of Ziman* v *New York State Div. of Hous. & Community Renewal*, 153 AD2d 489, *affd* 76 NY2d 727). The Appellant Division decided on statutory grounds and did not reach the constitutional issues. Following the Court of Appeals affirmance and subsequent denial of a motion to reargue by the tenants-intervenors, DHCR, on October 5, 1990, issued certificates of eviction.

Claimants were then subject to the three-month statutory waiting period between the date of issuance of the certificates of eviction and the commencement of proceedings against the tenants (9 NYCRR 2204.4 [b] [1] [i]). Claimants did not move to shorten this waiting period, as authorized by statute (9 NYCRR 2204.4 [3]). After commencing a summary holdover proceeding, claimants, on July 16, 1991, obtained judgments of possession and warrants of eviction. Housing Court then granted the tenants a discretionary stay of execution pursuant to Real Property Actions and Proceedings Law § 753. Claimants did not appeal this stay. The last tenant vacated the premises on January 2, 1992.

Claimants filed a notice of intention to file a claim with the Clerk of the Court on December 31, 1990, and served a copy upon the Attorney General, by certified mail, return receipt requested, on January 3, 1991 (*see*, Exh. A attached to State's cross-motion). The notice of intention alleges that the claim accrued on October 5, 1990. The claim was served upon the Attorney General on October 16, 1995 and filed with the Court on October 19, 1995 (*see*, Exh. B attached to State's cross-motion).

The claim asserts a cause of action against the State for temporary de facto appropriation of claimants' property as a result of the delay in evicting the tenants. The claim further asserts that it was timely filed under the three-year period set forth in Court of Claims Act § 10 (1) for appropriation claims. It also alleges that the time period was tolled during the pendency of a related Supreme Court action (*Ziman* v *New York State Div. of Hous. & Community Renewal and the State of New York* [Supreme Court New York County, Index No. 113700/93, judgment entered May 10, 1995 (*see*, Exh. I attached to claimants' motion)]). The Supreme Court dismissed claimants' appropriation cause of action on the basis of lack of subject matter jurisdiction. Claimants assert that

the action herein was timely commenced pursuant to CPLR § 205 (a) in that it was filed within six months of the dismissal of the Supreme Court action.

The Court must first determine whether this claim was timely and properly commenced. Court of Claims Act § 10 (1) provides that an appropriation claim be filed within three years of the accrual of the claim.

As claimants' counsel states in his memorandum of law in opposition to the State's cross-motion, Court of Claims Act § 10 (1) does not refer to the filing of notices of intention for appropriation claims, so the notice of intention served and filed in December 1990 did not extend claimants' time to file their claim. The question for the Court to determine is whether the claim served upon the Attorney General on October 16, 1995 and filed with the Court on October 19, 1995 was timely and properly commenced.

In his memorandum in opposition to the State's cross-motion, claimants' counsel asserts that claimants' cause of action accrued on January 2, 1992, the date on which the last tenant finally vacated. Claimants assert that this was the date on which their damages became ascertainable and that a claim accrues when damages accrue (*see, Boland* v *State of New York*, 30 NY2d 337; *Bronxville Palmer* v *State of New York*, 36 AD2d 647). Claimants assert that the actual eviction was a prerequisite to this claim; that until there was a successful eviction, a claim for delay in evicting the tenants would have been speculative (memorandum in opposition to cross-motion, p. 3).

For the purposes of this motion, the Court assumes, *arguendo*, that the claim accrued on January 2, 1992, the date urged by claimants. Claimants next argue that they filed a Supreme Court action (*Ziman* v *New York State Div. of Hous. & Community Renewal and the State of New York, supra*) in May 1993, one and one-half years after accrual; that the Statute of Limitations was tolled

during the pendency of that action and that, in any event, they (claimants) commenced the action herein within six months of the dismissal of the Supreme Court action and are entitled to the benefits of CPLR 205 (a).

The limitation period for bringing a claim in the Court of Claims is not automatically tolled as a result of improperly commencing a previous action (*see, ElSawah* v *State Ins. Fund*, 133 AD2d 540).

CPLR 205 (a) provides as follows:

> Termination of action
>
> (a) New action by plaintiff. If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action * * *.

Court of Claims Act § 9 (9) provides that practice in the Court of Claims shall be the same as in Supreme Court except as otherwise provided in the Court of Claims Act, the Uniform Rules for the Court of Claims, and the Civil Practice Law and Rules. The Court of Claims Act does not specifically preclude the application of CPLR 205 (a), nor is there an implied preclusion (*Charbonneau* v *State of New York*, 148 Misc 2d 891, *affd* 178 AD2d 815, *affd* 81 NY2d 721; *see also, Tramantano* v *State of New York*, 131 Misc 2d 238).

In *Charbonneau* (*supra*), the Court of Appeals stated that CPLR 205 (a) allows recommencement only where the prior action was "timely commenced". Thus, the Court of Appeals stated, "we look not to the characterization of the grounds for dismissal, but to the narrow question of what constitutes timely commencement" (*id.*, at 723).

Thus, we must determine whether the original action was timely commenced. Court of Claims Act § 10 (1) provides that an appropriation claim be filed with the Clerk of the Court within three years of accrual. The claim must also be served upon the Attorney General within the same time period (Eminent Domain Procedure Law § 503). Here, claimants commenced an action in Supreme Court, but it is uncontroverted that no claim was filed with the Court of Claims within three years of the claim's accrual. Because suits against the State are allowed only by the State's waiver of sovereign immunity and in derogation of the common law, statutory requirements conditioning suit must be strictly construed (*id.*; *Lurie* v *State of New York*, 73 AD2d 1006, *affd* 52 NY2d 849). Accordingly, where, as here, claimants have not met the literal requirements of Court of Claims Act § 10 (1), their action was not timely commenced and relief under CPLR 205 (a) is not available (*see, Charbonneau* v *State of New York, supra*).

In any event, even if the claim were timely filed, we would still dismiss it. Therefore, this Court finds that the governmental activities complained of by claimants do not constitute any type of an appropriation of their property. The actions of DHCR officials and DHCR administrative law judges are sovereign in character and are quasi-judicial in nature, and require the exercise of judgment and discretion. This is an area of governmental activity for which the State has not waived its immunity (*Arteaga* v *State of New York*, 125 AD2d 916, *affd* 72 NY2d 212; *Bernkrant*

v *State of New York*, 26 AD2d 964; *Rottkamp* v *Young*, 21 AD2d 373, *affd* 15 NY2d 831).

Judges of courts of record are absolutely immune from civil liability for all acts done in the exercise of a judicial function (*Lombardoni* v *Boccaccio*, 121 AD2d 828). Supreme Court is a court of record (Judiciary Law § 2 [5]), and a determination of an article 78 petition is part of a judicial function. Accordingly, the State cannot be held liable for the actions of the judge in issuing a decision on the article 78 petition which was eventually reversed on appeal.

Claimants rely on *Keystone Assoc.* v *State of New York* (39 AD2d 176, *affd* 33 NY2d 848) for the proposition that sovereign immunity does not apply to appropriation claims. We agree with that proposition. However, we find claimants' reliance on *Keystone* (*id.*) to be misplaced as the statute in that case created a private corporation and vested it with the power to condemn the plaintiff's property and appropriate it. The statute at issue in the instant case is not of the same nature as it did not specifically authorize the taking of anyone's property, especially claimants'.

Based upon the foregoing, the State's cross-motion is granted and the claim is dismissed as untimely filed. Claimants' motion for summary judgment is denied as moot.

DATED: Albany, New York
May 3, 1996

/s/ Louis C. Benza
LOUIS C. BENZA
Judge of the Court of Claims

APPENDIX E

[Filed Apr. 21, 1995]

SUPREME COURT OF THE STATE OF
NEW YORK
COUNTY OF NEW YORK
IAS PART 53

Index No.: 113700/93
Mot. Seq. 001
#147 of 12/1/94

JERROLD ZIMAN AND ELLEN ZIMAN,
Plaintiffs,

-against-

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,
and THE STATE OF NEW YORK,
Defendants.

STEPHEN G. CRANE, J.:

Plaintiffs Jerrold and Ellen Ziman move for partial summary judgment declaring the defendants the State of New York and its agency, the Division of Housing and Community Renewal ("DHCR" or "Agency") liable on plaintiffs' four causes of action.[1] Plaintiffs seek to establish that three statutory rules governing evictions and the Agency's conduct in enforcing them constitute takings of property under the State and Federal constitutions for which the defendants owe just compensation. Plaintiffs also seek a judgment declaring that their right to due process of law was violated.

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[1] Plaintiffs have neglected to include a copy of the pleadings in their motion papers as required by CPLR 3212(b). The court, in this instance, will overlook this infirmity in view of the fact that the defendants have included the pleadings in support of their cross motion.

Defendants cross-move for summary judgment dismissing plaintiffs' complaint on the grounds that the court lacks subject matter jurisdiction, defendants are collaterally estopped from raising these issues, and, if the merits are reached, a declaration that the challenged statutes and their applications are constitutional.

Plaintiffs' claims arise from their efforts to evict three tenants [2] from a town house they bought on Minetta Street in Manhattan and the number of years it took ultimately to accomplish this. They purchased the property in February, 1984. Plaintiffs sought to obtain the units for their personal use and occupancy by applying to the DHCR for certificates of eviction of the tenants. Plaintiffs were prevented from obtaining the certificates of eviction by the enactment of Chapter 234, Laws of 1984, 9 NYCRR 2204.5(a), which, among other things, protects tenants from eviction who have been residents in rent-controlled apartments for more than twenty years (the "Twenty Year Law").

In August 1984, plaintiffs then moved for eviction based on a different ground, to wit, a "hardship" eviction pursuant to 9 NYCRR 2204.4(4) and (9) because they could not earn an 8½% return on the assessed value. Two financial audits, completed in April and October 1985, and a fact finding hearing established that plaintiffs qualified for the hardship application.

In June 1986, a DHCR Administrative Law Judge ruled that despite plaintiffs' showing of hardship, they were not permitted to evict their tenants because the hardship provisions of the rent control law could not circumvent the separate protections provided by the Twenty Year Law. Plaintiffs commenced an Article 78 proceeding challenging the Agency decision. One of the constitutional claims at issue on this motion was presented in the

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[2] One tenant died during the course of the proceedings; eviction warrants were ultimately issued againts the remaining two.

Article 78 proceeding. In August 1988, the Supreme Court upheld the Agency's decision, holding that the Agency order was not unconstitutional as applied.

In August 1989, the Appellate Division reversed the Supreme Court and ordered the DHCR to issue certificates of eviction based on plaintiffs' hardship application (*Ziman v. New York State Division of Housing and Comm. Renewal*, 153 AD2d 489, *aff'd* 76 NY2d 727). The Appellate Division decided on statutory grounds and did not reach the constitutional issues. Following the Court of Appeals affirmance and subsequent denial of a motion to reargue by the tenants-intervenors, the DHCR issued certificates of eviction on October 5, 1990.

Plaintiffs were then subject to the three month statutory waiting period between the date of issuance of the certificates of eviction and the commencement of the proceedings against the tenants. 9 NYCRR 2204.4(b)(1)(i). Plaintiffs did not move to shorten this waiting period as authorized by the statute. 9 NYCRR 2404.4(3). After commencing a summary holdover proceeding, plaintiffs obtained judgments of possession and warrants of eviction on July 16, 1991. Housing Court then granted the tenants a discretionary stay of execution pursuant to RPAPL 753. Plaintiffs did not appeal this stay. The last tenant vacated the premises on January 2, 1992.

On December 27, 1990, plaintiffs filed a Notice of Intention to File a Claim in the Court of Claims. This notice raised some of the constitutional issues now before this court. Plaintiffs, however, did not pursue the action in the Court of Claims, and defendants allege that the time to do so expired in December 1992.

Plaintiffs now argue that the delays in issuing the certificates of eviction by the DHCR, and the application of the Twenty Year Law, the three-month waiting period (9 NYCRR 2204.4(b)(1)(i)) and the six-month stay of eviction (RPAPL 753), each operated as an unconstitu-

tional taking of plaintiffs' property for which they are owed just compensation, and denied them due process of law

Subject Matter Jurisdiction

It is well settled that the proper forum for a claim seeking a declaration regarding the constitutionality of a statute is the Supreme Court (CPLR 3001; *Shields v. Katz*, 143 AD2d 743, 744 [2d Dept 1988]; *Wikarski v. State of New York*, 91 AD2d 1174 [4th Dept 1983]; *Fehlhaber Corp. v State of New York*, 69 AD2d 362, 374 [3d Dept 1979]). Although an action primarily seeking money damages against the State must be brought in the Court of Claims (*see*, NY Const, art VI, § 9; Court of Claims Act §§ 8, 9; *Schaffer v. Evans*, 57 NY2d 992, 994 [1982]), the Supreme Court may properly consider claims for monetary relief against the State which are dependent upon a threshold claim for declaratory relief (*see*, *Cass v. State of New York*, 58 NY2d 460, 463 [1983]; *Weissman v. Evans*, 56 NY2d 458 [1982]; *Kendall v. Evans*, 100 AD2d 508, 509 [2d Dept 1984]).

The general purpose of a declaratory judgment is to stabilize uncertain or disputed rights to present or prospective obligations (*James v. Alderton Dock Yards*, 256 NY 298, 305). Plaintiffs do not seek prospective relief; the tenants were evicted from plaintiffs' town house several years ago and the controversey concerning the tenants has come to an end. If the plaintiffs are entitled to any relief, it is retroactive only. Although this does not necessarily bar a suit against the State in the Supreme Court (*see*, *e.g.*, *Kendall v. Evans*, *supra*, 100 AD2d 508), it is fatal to plaintiffs' action. Plaintiffs' complaint and the arguments offered in support of their claims evidence that their "takings" claims are not dependent upon, nor do they require, a declaration of the unconstitutionality of the regulations at issue. Indeed, plaintiffs admit that they "are not challenging the rent control's validity." (Plain-

tiffs' Memorandum in Opposition to Defendants' Cross Motion, p. 15, dated Nov. 30, 1994). Rather, the primary focus of plaintiffs' claim is for money damages. To obtain this relief they need a determination of whether there was a taking of their property in violation of the State (NY Const, art I, § 7[a]) and Federal (US Const, 5th Amend) Constitutions,[3] a claim properly pursued under the Eminent Domain Procedure Law ("EDPL"). Indeed, plaintiffs cannot deny that the court could find a "taking" of their property without declaring any regulation unconstitutional.

Recognizing this, plaintiffs argue that judicial determinations of whether there has been a *de facto* taking are "not exclusively reserved for the Court of Claims." This blanket statement is wrong. EDPL 501(a) vests exclusive jurisdiction in the Court of Claims to hear and determine claims "against the state for the appropriation of any real or personal property," which extends to claims arising out of unconstitutional *de facto* appropriations of private property by the State (Court of Claims Act, § 9). Plaintiffs' reliance on the language in EDPL 702(c) is equally misplaced. Section 702(c) provides, in pertinent part, "[i]n the event that *a court of competent jurisdiction* determines that the condemnor did in fact take property. . . the condemnor shall be obligated to reimburse a condemnee . . . for actual and necessary costs . . . including reasonable attorney . . . fees. . . ." (emphasis supplied). Plaintiffs derive from this "court of competent jurisdiction" language that the "EDPL expressly envisions that the determination of whether there has been a taking can be made not only by the Court of Claims, but by any court of competent jurisdiction." Not exactly. EDPL 702 merely takes into consideration that claims of unconstitutional takings of

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[3] The taking without just compensation clause of the 5th Amendment is applicable to the States through the 14th Amendment (*see, Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 236).

property are made not only against the State; municipal corporations and other public entities may also act as the "condemnor." And, pursuant to EDPL 501(b), the Supreme Court is vested with exclusive jurisdiction to adjudicate 5th Amendment claims against municipal corporations and other public entities (*see, Cox v. City of New York*, 265 NY 411, *cert. den.* 294 US 729). Accordingly, EDPL 702(c) merely gives authority to both the Court of Claims and the Supreme Court to grant attorneys fees in connection with the respective claims over which each court has jurisdiction, but it in no way diminishes the clear language of EDPL 501.

Plaintiffs' reliance on the pendency of two recent cases in the Supreme Court as support for their argument is equally misplaced. In the case of *Manocherian v. Lenox Hill Hosp. and the State of New York*, (154 Misc 2d 982), the plaintiffs sought to challenge the constitutionality of the Rent Stabilization Laws, and a declaration that they were not required to offer renewal leases to Lenox Hill Hospital. The State was a necessary party to the litigation because of its obvious interest in and right to be heard on matters concerning the constitutionality of statutes (*Cass v. State of New York*, 56 NY2d 460, 463; *Kendall v. Evans, supra*, 100 AD2d at 509). Significantly, *Manocherian* merely sought declaratory relief against the State; the monetary damages were sought only against Lenox Hill Hospital in connection with the renewal leases and were ancillary to the declaratory relief. Likewise, in *19th Street Assocs. v. State of New York*, (172 AD2d 380), no monetary damages were demanded; plaintiffs sought merely declaratory relief. In contrast with these cases are the claims by the Zimans, where the essence of the claims are for money damages. Plaintiffs' arguments in opposition completely ignore the provisions of the Court of Claims Act which preserve to the Court of Claims actions against the State in which the primary relief claimed is monetary (Court of Claims Act, §§ 8, 9). In sum, the

Court of Claims is the proper forum for resolution of the takings claims.

Due Process

Nevertheless, plaintiffs also seek a declaration that their rights to due process of law were violated by (1) the DHCR's delay in issuing the certificates of eviction, (2) the Twenty Year Law, (3) 9 NYCRR § 2204.4(b)(1)(i), and (4) RPAPL § 753. These claims are properly addressed by this court, given the limitation on the authority of the Court of Claims to entertain such questions (*see*, CPLR 3001).

Under the New York State Constitution (art I, § 6), no person may be deprived of his or her property without due process of law. Despite this constitutional protection, however, property rights are not absolute (*Dawson v. Higgins*, 197 AD2d 127, 132 [1st Dept 1994], *appeal dismissed* 83 NY2d 996, *cert. denied* 115 SCt 724 [1995]).

Although the First Department in *Dawson v. Higgins*, *supra*, has already rejected the argument that the Twenty Year Law deprives a landlord of due process of law, describing such a claim as "frivolous" (197 AD2d at 138), the gist of plaintiffs' due process claim is that the Twenty Year Law was passed *after* they purchased the property. However, plaintiffs were not barred from seeking to evict the tenants on a number of other grounds, one of which they successfully pursued, that is, the hardship application. The enactment of the Twenty Year Law did not create perpetual tenancies nor deprive the plaintiffs of the opportunity to litigate their right to the property. Moreover, "[r]ent control provisions . . . are well within the government's police powers. They bear 'a reasonable relationship to the valid public purpose of preserving affordable housing and preventing the dislocation of lower income and moderate income tenants." (*Id.* at 138-139; *Sobel v. Higgins*, 188 AD2d 286, 288). This is equally true of the

regulation providing for a three month automatic waiting period (9 NYCRR 2204.4(b)(1)(i)) and the six month stay of eviction (RPAPL 753). Finally, plaintiffs were afforded all of the process they were due in this litigation [4]; their claims were litigated in the Supreme Court, Appellate Division, and the Court of Appeals. Any "delay" in issuing the certificates of eviction not only served the purpose of protecting the tenants from being forced into the streets without their day in court, but also was the result of the parties' exercise of their rights to litigate fully their claims in the courts of this state. Therefore, the court determines that the plaintiffs were not deprived of due process of law.

In view of the foregoing conclusion, the court does not reach the collateral estoppel defense raised on the cross motion.

Accordingly, it is

ORDERED that the motion for summary judgment is denied; and it is further

ORDERED that the cross motion for summary judgment dismissing plaintiffs' complaint is granted in part so as to dismiss the claims for money damages for lack of subject matter jurisdiction and to declare the constitutionality of the challenged statutes and regulations and otherwise denied as academic; and it is further

ORDERED that plaintiffs' complaint is dismissed as to the claims seeking redress for monetary damages resulting from the taking of its property; and it is further

ORDERED, ADJUDGED AND DECLARED that DHCR's delay in issuing the eviction certificates did not violate plaintiffs' due process rights; and it is further

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[4] Although 9 NLCRR 2204.4(3) gives the Agency the authority to shorten the waiting period, plaintiffs never applied for this relief. Nor did plaintiffs appeal the discretionary stay granted the tenants under RPAPL 753.

ORDERED, ADJUDGED AND DECLARED that the enforcement of Chapter 234, Laws of 1984 did not unconstitutionally violate plaintiffs' due process rights; and it is further

ORDERED, ADJUDGED AND DECLARED that the enforcement of 9 NYCRR 2204.4(b)(1)(i) did not violate plaintiffs' due process rights; and it is further

ORDERED, ADJUDGED AND DECLARED that the enforcement of RPAPL § 753 did not violate plaintiffs' due process rights.

This is the decision and judgment of the court.

DATED: Apr. 13, 1995

ENTER:

Stephen G. Crane
J.S.C.

Norman Goodman
Clerk

APPENDIX F

STATUTORY PROVISIONS

McKINNEY'S 1984 SESSION LAWS OF NEW YORK

EVICTION OF SENIOR CITIZENS, LONG TERM OR DISABLED TENANTS ON GROUNDS OF LANDLORD'S PERSONAL USE

CHAPTER 234

Approved June 19, 1984, effective as provided in section 4

AN ACT to amend the administrative code of the city of New York, the emergency housing rent control law and the emergency tenant protection act of nineteen seventy-four, in relation to the eviction of senior citizens, long term or disabled tenants on grounds of landlord's personal use

The People of the State of New York, represented in Senate and Assembly, do enact as follows:[*]

Section 1. Paragraph one of subdivision b of section Y51-6.0 of the administrative code of the city of New York, as added by local law number twenty of the city of New York for the year nineteen hundred sixty-two and such section as renumbered by chapter one hundred of the laws of nineteen hundred sixty-three, is amended to read as follows:

(1) The landlord seeks in good faith to recover possession of a housing accommodation because of immediate and compelling necessity for his own personal use and occupancy or for the use and occupance of his immediate family[:] provided, however, that [where the housing accommodation is located in a building containing twelve or less housing accommodations and the landlord does not reside in the building and the landlord seeks in good

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[*] Additions in text indicated by italics; deletions indicated by brackets.

faith to recover possession for his own personal use and occupancy, an immediate and compelling necessity need not be established] *this subdivision shall not apply where a member of the household lawfully occupying the housing accommodation is sixty-two years of age or older, has been a tenant in a housing accommodation in that building for twenty years or more, or has an impairment which results from anatomical, physiological or psychological conditions, other than addiction to alcohol, gambling, or any controlled substance, which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques, and which are expected to be permanent and which prevent the tenant from engaging in any substantial gainful employment*; or

* * * *

§ 4. This act shall take effect immediately and shall apply to any tenant in possession at or after the time it takes effect, regardless of whether the landlord's application for an order, refusal to renew a lease or refusal to extend or renew a tenancy took place before this act shall have taken effect. The amendment to section Y51-6.0 of the city rent and rehabilitation law [1] made by section one of this act shall remain in full force and effect only so long as the public emergency requiring the regulation and control of residential rents and evictions continues, as provided in subdivision three of section one of the local emergency housing rent control act.[2] The amendment to section five of the emergency housing rent control law [3] made by section two of this act shall expire on the same date as such law expires and shall not affect the expiration of such law as provided under section one of such law. The amendment to section ten of the emergency tenant protection act of nineteen seventy-four [4] made

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[1] McK.Unconsol.Laws § Y51-6.0.

[2] McK.Unconsol.Laws § 8601.

[3] McK.Unconsol.Laws § 8585.

[4] McK.Unconsol.Laws § 8630.

by section three of this act shall expire on the same date as such act expires and shall not affect the expiration of such act as enacted by chapter five hundred twenty-six of the laws of nineteen hundred seventy-four, as last extended by chapter four hundred three of the laws of nineten hundred eighty-three.

APPENDIX G

STATUTORY PROVISIONS

RENT AND EVICTION REGULATIONS OF THE NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL

SUBCHAPTER D—NEW YORK CITY RENT AND EVICTION REGULATIONS

[65 McKinney Unconsolidated Laws 1987
set forth following § 8597]

§ 2204.5 Occupancy by landlord or immediate family

(a) A certificate shall be issued where the landlord seeks in good faith to recover possession of a housing accommodation because of immediate and compelling necessity for his own personal use and occupancy, or for the use and occupancy of his immediate family; provided, however, that this section shall not apply where a member of the household lawfully occupying the housing accommodation is 62 years of age or older, has been a tenant in a housing accommodation in that building for 20 years or more, or has an impairment which results from anatomical, physiological or psychological conditions, other than addiction to alcohol, gambling or any controlled substance, which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques, and which are expected to be permanent and which prevent the tenant from engaging in any substantial gainful employment. As used in this subdivision, the term "immediate family" includes only a son, daughter, grandson, granddaughter, stepson, stepdaughter, father, mother, father-in-law, mother-in-law, grandfather, grandmother, stepfather or stepmother.